

A LIN WEN-CHIH & ANOR
v. PACIFIC FOREST INDUSTRIES SDN BHD & ANOR

FEDERAL COURT, PUTRAJAYA
ABANG ISKANDAR PCA
MOHD ZAWAWI SALLEH FCJ
B ZABARIAH MOHD YUSOF FCJ
[CIVIL APPEAL NO: 02(f)-38-07-2021(S)]
7 AUGUST 2023

C **Abstract** – *When the identity of the subject matter of the present claim has been conclusively dealt with on merit by the courts in an earlier suit and the parties involved are exactly similar, the important elements of res judicata are established and proved.*

D **CIVIL PROCEDURE:** *Res judicata – Principle – Elements of – Whether established – Case concerning claim for debt owed by company to former directors/ shareholders – Whether identity of subject matter of present claim had been conclusively dealt with on merit in earlier suit – Whether causes of action similar – Whether parties similar – Whether case caught by res judicata – Whether res judicata in wider sense applicable*

E This case concerned a claim for debt owed by a company to former
directors/shareholders. The plaintiffs were former shareholders and
directors of Pacific Forest Industries Sdn Bhd ('first defendant'). They ceased
to be shareholders/directors of the first defendant when they sold their shares
F to the second defendant. At all material times, the first defendant was
indebted to the plaintiffs a total sum of RM10,134,000. The debt was
admitted, acknowledged and evidenced, primarily through the first
defendant's letter of acknowledgment dated 12 November 1996, and which
was guaranteed by the second defendant's letter of undertaking similarly
dated 12 November 1996. Pursuant to an arrangement on the mode of
G payment of the admitted debt, one delivery of timber products was
successfully completed, hence, reducing the debt amount. In 1997, the
plaintiffs filed the suit to claim RM6,223,241.10 being the balance of the
outstanding sum of the debt. This claim was dismissed by the High Court on
the basis of 'premature' as the 'plaintiffs failed to comply with the terms
H stipulated in the letter of acknowledgment', within the time specified. On
appeal, the Court of Appeal reversed the findings of the High Court and set
aside its decision on the basis of 'frustration'. On further appeal to the
Federal Court, both the defendants succeeded in setting aside the decision of
the Court of Appeal and reinstating the judgment of the High Court because
I the 'frustration' issue which was the basis of the Court of Appeal's decision
was not the plaintiff's pleaded ground. Notwithstanding, the matter did not

end there. Another action was taken in 2013. Despite knowing that the first defendant had stopped operating the sawmill in July 1998, the plaintiffs issued another fresh order dated 23 October 2012 for the supply of timber products purportedly as per the letter of acknowledgment. Thirty days were given for shipment of the timber products. Nothing was forthcoming from the first defendant. Thereafter, the plaintiffs issued another letter in December 2012 cancelling the purchase order and demanding immediate cash payment of RM6,223,241. A letter of demand was also sent to the second defendant as a guarantor. In May 2013, the plaintiffs filed the writ claiming the said sum together with interest thereto. The defendants admitted receiving the notices and demands by the plaintiffs. However, they denied liability mainly on two grounds – limitation and *res judicata*. Hence, a striking out application was filed and was allowed by the High Court. However, on appeal, the Court of Appeal reinstated the 2013 suit and set aside the High Court striking out order. Leave to appeal to the Federal Court was dismissed, and a review of the said Federal Court decision was withdrawn. The 2013 suit then proceeded to trial. In this 2013 suit, the High Court was of the view that the claim was not barred by *res judicata* because, *inter alia*, the dismissal of the plaintiffs' claim in 1997 on the ground of premature was not a bar to the recovery of the said debt in the 2013 suit. Having so decided, however, the High Court dismissed the plaintiffs' claim after a full trial, based on its finding that, *inter alia*, by their own conduct, the plaintiffs had failed to comply with the express and clear terms of the letter of acknowledgment. Dissatisfied, the plaintiffs appealed to the Court of Appeal. The defendants also filed a notice of cross-appeal against the High Court's decision in respect of, *inter alia*, the issue of *res judicata*. The Court of Appeal, in relation to the issue of *res judicata*, found that the facts and circumstances of the present case came within the principle of *res judicata* in the wider sense because: (i) cause of action in both 1997 and 2013 suits were exactly the same which was based on the letter of acknowledgment and the letter of undertaking; (ii) the subject matter of both suits was exactly the same – the alleged outstanding sum of RM6,223,241 except for the accruing interest claimed in the 2013 suit; and (iii) the evidence adduced and issues raised by the plaintiffs in the 2013 suit were substantially similar to what was produced in the 1997 suit. Before this court, one issue that would determine and dispose of the appeal was whether the plaintiffs' case was caught by *res judicata*.

Held (dismissing appeal)

Per Abang Iskandar PCA delivering the judgment of the court:

- (1) In a challenge based on *res judicata*, the court was entitled to examine and analyse the written judgments of the first 1997 suit and all other relevant records of appeal. After carefully reading and examining the written judgment of the Court of Appeal, specifically those paragraphs where the 'premature' issue was discussed, there was no redefinition of

- A the word 'premature' as alleged. In fact, its understanding of the
meaning of 'premature' was consistent with what the courts in the 1997
suit had described. The Court of Appeal concluded that 'premature' as
B meant by the High Court and the Federal Court in the 1997 suit
exemplified the fact that 'the plaintiffs had not complied with the terms
of the letter of acknowledgment (cl. 5) so as to trigger the first
defendant's obligation to pay in cash ... that the plaintiffs had not made
out their case for purposes of the claim which was predicated on the
letter of acknowledgment'. The above statement by the Court of Appeal
C was in line with what the High Court stated in the 1997 suit that 'since
the plaintiffs failed to comply with the terms stipulated in exh. P2 within
the time specified or within a reasonable time after the expiry and since
it was not shown that the events that could have triggered the payment
of cash had arisen, the claim should therefore be taken as premature.'
On this basis, there was no error by the Court of Appeal in
D its understanding of the meaning of 'premature' of the 1997 suit.
(paras 40-43)
- (2) The important elements of *res judicata* were established and proved – that
the identity of the subject matter of the present claim which was based
on the same admission of debt evidenced through the letter of
E acknowledgment and the letter of undertaking had been conclusively
dealt with on merit by the courts in the 1997 suit; and that the parties
were exactly similar. On the new issues raised, *albeit* being newly raised,
were issues that fell under the category where '... The plea of *res judicata*
F applies, except in special cases, not only to points upon which the court
was actually required by the parties to form an opinion and pronounce
a judgment, but to every point which properly belonged to the subject
of litigation, and which the parties, exercising reasonable diligence,
might have brought forward at the time.' Upon close examination and
analysis of the facts and circumstances of this case, and taking into
consideration the case of *Hoystead v. Commissioner Of Taxation*,
G *res judicata* in the wider sense was rightly applied by the Court of Appeal.
(paras 44-47)

Bahasa Melayu Headnotes

- Kes ini berkaitan dengan tuntutan hutang yang dihutang oleh syarikat kepada
bekas pengarah/pemegang saham. Plaintiff-plaintif adalah bekas pemegang
H saham dan pengarah Pacific Forest Industries Sdn Bhd ('defendan pertama').
Mereka tidak lagi menjadi pemegang saham/pengarah defendan pertama
apabila mereka menjual saham mereka kepada defendan kedua. Pada setiap
masa material, defendan pertama berhutang kepada plaintiff-plaintif yang
I jumlah keseluruhannya adalah RM10,134,000. Hutang tersebut diakui dan

dibuktikan, terutamanya melalui surat pengakuan defendan pertama bertarikh 12 November 1996, dan dijamin oleh surat akujanji defendan kedua bertarikh 12 November 1996. Menurut persetujuan berkenaan cara bayaran untuk hutang yang diakui, satu penghantaran produk kayu berjaya diselesaikan, oleh itu, mengurangkan jumlah hutang. Pada tahun 1997, plaintif-plaintif mengemukakan tuntutan untuk menuntut RM6,223,241.10 sebagai baki jumlah hutang yang belum dijelaskan. Tuntutan ini ditolak oleh Mahkamah Tinggi atas alasan itu adalah 'pramatang' kerana plaintif-plaintif 'gagal mematuhi syarat-syarat yang ditetapkan dalam surat pengakuan', dalam tempoh waktu yang ditentukan. Atas rayuan, Mahkamah Rayuan mengakas dapatan Mahkamah Tinggi dan mengetepikan keputusannya berdasarkan 'kekecewaan'. Atas rayuan kepada Mahkamah Persekutuan, kedua-dua defendan berjaya mengetepikan keputusan Mahkamah Rayuan dan mengembalikan semula keputusan Mahkamah Tinggi kerana isu 'kekecewaan' yang menjadi asas keputusan Mahkamah Rayuan bukanlah alasan yang dihidkan dalam permohonan plaintif-plaintif. Walau apa pun, perkara itu tidak berakhir di situ. Tindakan lain telah diambil pada tahun 2013. Walaupun mengetahui bahawa defendan pertama telah berhenti mengoperasikan kilang papan pada bulan Julai 1998, plaintif mengeluarkan pesanan baru bertarikh 23 Oktober 2012 untuk pembekalan produk kayu yang kononnya mengikut surat pengakuan. Tiga puluh hari diberikan untuk penghantaran produk kayu. Defendan tidak menyerahkan apa-apa. Selepas itu, plaintif-plaintif mengeluarkan surat pada bulan Disember 2012 untuk membatalkan pesanan pembelian dan menuntut pembayaran tunai segera sebanyak RM6,223,241. Surat tuntutan juga dikirimkan kepada defendan kedua sebagai penjamin. Pada bulan Mei 2013, plaintif-plaintif mengemukakan surat perintah yang menuntut jumlah tersebut bersama-sama dengan faedahnya. Defendan-defendan mengakui menerima notis dan tuntutan oleh plaintif-plaintif. Walau bagaimanapun, mereka menafikan liabiliti terutamanya atas dua alasan – had masa dan *res judicata*. Oleh itu, permohonan pembatalan difailkan dan dibenarkan oleh Mahkamah Tinggi. Namun, atas rayuan, Mahkamah Rayuan mengembalikan semula guaman 2013 dan mengetepikan perintah pembatalan yang diberikan oleh Mahkamah Tinggi. Kebenaran untuk mengemukakan rayuan kepada Mahkamah Persekutuan ditolak, dan semakan keputusan Mahkamah Persekutuan tersebut ditarik balik. Guaman 2013 seterusnya dibicarakan. Dalam guaman 2013 ini, Mahkamah Tinggi berpendapat bahawa tuntutan tersebut tidak dilarang oleh *res judicata* kerana, antara lain, penolakan tuntutan plaintif-plaintif pada tahun 1997 dengan alasan pramatang bukanlah penghalang untuk pemulihan tuntutan hutang tersebut dalam guaman 2013. Namun, setelah memutuskan demikian, Mahkamah Tinggi menolak tuntutan plaintif-plaintif setelah perbicaraan penuh, berdasarkan penemuan bahawa, antara lain, dengan tingkah laku mereka sendiri, plaintif-plaintif gagal mematuhi

A

B

C

D

E

F

G

H

I

- A syarat-syarat yang jelas dan terang dalam surat pengakuan. Tidak berpuas hati, plaintif-plaintif mengemukakan rayuan kepada Mahkamah Rayuan. Defendan-defendan juga mengemukakan notis rayuan balas terhadap keputusan Mahkamah Tinggi berkenaan dengan isu-isu, antara lain, *res judicata*. Mahkamah Rayuan, berkaitan dengan isu *res judicata*, mendapati
- B bahawa fakta dan keadaan kes ini termasuk dalam prinsip *res judicata* dalam maksud yang lebih luas kerana: (i) kausa tindakan dalam kedua-dua guaman 1997 dan 2013 adalah sama berdasarkan surat pengakuan dan surat akujanji; (ii) subjek perkara kedua-dua guaman itu adalah sama – jumlah yang dikatakan tertunggak sebanyak RM6,223,241 kecuali untuk faedah yang
- C dituntut dalam guaman 2013; dan (iii) keterangan yang dikemukakan dan isu-isu yang dibangkitkan oleh plaintif-plaintif dalam guaman 2013 pada dasarnya serupa dengan yang dikemukakan dalam guaman 1997. Di hadapan mahkamah ini, satu isu yang akan menentukan dan melupuskan rayuan adalah sama ada kes plaintif-plaintif adalah dihalang oleh *res judicata*.
- D **Diputuskan (menolak rayuan)**
Oleh Abang Iskandar PMR menyampaikan penghakiman mahkamah:
- (1) Dalam bantahan berdasarkan *res judicata*, mahkamah berhak untuk memeriksa dan menganalisis penghakiman bertulis guaman 1997 pertama dan semua catatan rayuan lain yang relevan. Setelah membaca
- E dan memeriksa dengan teliti penghakiman bertulis Mahkamah Rayuan itu, khususnya perenggan-perenggan di mana isu ‘pramatang’ dibincangkan, tidak ada definisi semula perkataan ‘pramatang’ seperti yang didakwa. Sebenarnya, pemahaman Mahkamah Rayuan tentang maksud ‘pramatang’ sesuai dengan apa yang telah dijelaskan oleh
- F mahkamah dalam guaman 1997. Mahkamah Rayuan menyimpulkan bahawa ‘pramatang’ seperti yang dimaksudkan oleh Mahkamah Tinggi dan Mahkamah Persekutuan dalam tuntutan 1997 menunjukkan fakta bahawa ‘plaintif-plaintif tidak mematuhi syarat-syarat surat pengakuan
- G (kl. 5) untuk mencetuskan kewajipan defendan pertama untuk membayar secara tunai ... bahawa plaintif-plaintif tidak membuktikan kes mereka untuk tujuan tuntutan berdasarkan pada surat pengakuan.’ Pernyataan di atas oleh Mahkamah Rayuan selaras dengan apa yang dinyatakan oleh Mahkamah Tinggi dalam guaman 1997 yang ‘kerana plaintif-plaintif gagal mematuhi syarat-syarat yang ditetapkan dalam eksh. P2 dalam tempoh waktu yang ditentukan atau dalam waktu yang wajar setelah
- H keluputan dan kerana tidak ditunjukkan bahawa peristiwa yang boleh mencetuskan pembayaran tunai telah timbul, tuntutan tersebut oleh itu dikatakan sebagai pramatang’. Atas dasar ini, tidak ada kesalahan oleh Mahkamah Rayuan dalam memahami maksud ‘pramatang’ dalam guaman 1997.
- I

- (2) Unsur-unsur penting *res judicata* telah ditubuhkan dan dibuktikan – A
bahawa identiti hal perkara tuntutan ini yang berdasarkan pada
pengakuan hutang yang sama dibuktikan melalui surat pengakuan, dan
surat akujanji telah ditangani secara muktamad oleh mahkamah dalam
guaman 1997; dan bahawa pihak-pihak adalah sama. Mengenai isu-isu B
baru yang dibangkitkan, walaupun baru dibangkitkan, adalah isu-isu
yang termasuk dalam kategori ‘... Akuan *res judicata* diguna pakai,
kecuali dalam kes-kes khas, tidak hanya pada perkara-perkara di mana
mahkamah benar-benar diharuskan oleh para pihak untuk membentuk
pendapat dan menyampaikan keputusan, tetapi untuk setiap titik yang
benar-benar merangkumi subjek litigasi, di mana pihak-pihak C
mengemukakannya pada waktu itu dengan keperihatinan munasabah.’
Setelah meneliti dan menganalisis fakta dan keadaan kes ini, dan
mempertimbangkan kes *Hoystead v. Commissioner of Taxation*, *res judicata*
dalam maksud yang lebih luas diguna pakai dengan betul oleh
Mahkamah Rayuan.

D

Case(s) referred to:*Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783 SC (*refd*)*Carl-Zeiss-Stiftung v. Rayner and Keeler Ltd and Others (No 2)* [1966] 2 All ER 536 (*refd*)*Greenhalgh v. Mallard* [1947] 2 All ER 255 (*refd*)*Henderson v. Henderson* (1843) 3 Hare 100 (*refd*)*Hoystead v. Commissioner of Taxation* [1926] AC 155 (*refd*)

E

Lin Wen-Chih & Anor v. Pacific Forest Industries Sdn Bhd & Anor [2001] 5 CLJ 519
HC (*refd*)*Lin Wen-Chih & Anor v. Pacific Forest Industries Sdn Bhd & Anor* [2008] 5 CLJ 29 CA (*refd*)*Lin Wen-Chih & Anor v. Pacific Forest Industries Sdn Bhd & Anor* [2018] 1 LNS 2022
HC (*refd*)

F

Lin Wen-Chih & Anor v. Pacific Forest Industries Sdn Bhd & Anor [2020] 1 LNS 2104
CA (*refd*)*Pacific Forest Industries Sdn Bhd & Anor v. Lin Wen-Chih & Anor* [2009] 6 CLJ
430 FC (*refd*)*The Pacific Bank Bhd v. Chan Peng Leong* [1998] 2 CLJ 440 CA (*refd*)*Yat Tung Investment Co v. Dae Heng Bank & Anor* [1975] AC 581 (*refd*)

G

Legislation referred to:

Limitation Ordinance 1952 (Sabah) (Cap 72), ss. 9, 14, Schedule items 97, 102

*For the appellants - Roland Cheng Ho Wah; M/s Roland Cheng & Co**For the respondents - Alex Decena, Victor Chong Thien Loi & Leslie Chaw; M/s Poh
& Victor Chong*

H

*[Editor's note: For the Court of Appeal judgment, please see Lin Wen-Chih & Anor
v. Pacific Forest Industries Sdn Bhd & Anor [2020] 1 LNS 2104 (affirmed); For the
High Court judgment, please see [2018] 1 LNS 2022 (overruled).]**Reported by Suhainah Wahiduddin*

I

A

JUDGMENT

Abang Iskandar PCA:

Introduction

- [1] We heard this appeal on 14 February 2022 with ten questions of law (QOL) granted at the leave stage for our determination. The ten QOLs concern mainly issues of unjust enrichment; *res judicata*; limitation; constructive/implied trust; estoppel; frustration; reciprocal promises; and appellate jurisdiction. The ten QOLs read:
- (i) whether the test for unjust enrichment is “act or delivery of thing that can be said to have done by the plaintiffs which was not intended to be done gratuitously that had benefitted the defendants”?
 - (ii) whether *res judicata* applies to a second action filed after the Federal Court in a first action has ruled it to be premature with unsatisfied conditions precedent?
 - (iii) whether the time ceases to run under the Sabah Limitation Ordinance (“SLO”) during the duration of prosecution and appeal of a first action subsequently ruled by the Federal Court as premature and such time is excluded for filing a second action?
 - (iv) whether an admission of debt found and not extinguished can be categorised under constructive or implied trust thereby excluded under s. 9 of SLO?
 - (v) whether estoppel *per se* applies to admitted debt by a party from reneging its obligation to pay the admitted debt?
 - (vi) whether a claim for unjust enrichment and/or for frustration fall under item 97 or 102 of SLO? If so, whether the limitation for unjust enrichment and/or frustration is six years or 12 years?
 - (vii) whether a second panel of Court of Appeal may revisit and revise a finding by the first panel of Court of Appeal on a same point of law and or fact? If so, what are the conditions under which a second panel of Court of Appeal may do so?
 - (viii) when does the cause of action arise and limitation starts to run for an admitted debt found to be not extinguished?
 - (ix) whether the findings and pleadings in earlier judgments in a first action in respect of the same case by the High Court and Federal Court are binding on a second panel? If so, what are the circumstances in which the court may go beyond the pleaded case and refer to an earlier judgment on the same case?
 - (x) whether the test is “objective aim” or “real nature of transaction” to determine the order of performance of reciprocal promises?

[2] Before us, the major attack of the Court of Appeal decision was in respect of the alleged reopening of the issues that were already decided in the first 1997 suit in the sense that the Court of Appeal had redefined the meaning of “premature” inconsistent with what was held and decided by the courts in the 1997 suit. This was raised in relation to the *res judicata* issue.

A

[3] Other matters concern the defence of limitation to the admitted debt that was allegedly not extinguished, unjust enrichment, constructive trust, frustration, estoppel and reciprocal promises.

B

Our Decision

[4] Having read the cause papers and parties’ written submissions and having heard and considered the oral submissions by both learned counsel on all issues raised, we were unanimous in our view that the one issue that will determine and dispose of the appeal was whether the appellants’ case was caught by *res judicata*.

C

[5] In that regard, we were with learned counsel for the respondents that the Court of Appeal justices were correct in applying the principle of *res judicata* to the circumstances of this appeal when holding that the issues raised in the 2013 suit were identical and bore similarities with those raised in the 1997 suit. Those issues raised in the 2013 suit were issues that could have been raised in the 1997 suit and as such, they were caught by the principle of *res judicata* in the wider sense.

D

[6] We therefore declined to answer the questions posed before us because the outcome of that exercise will not alter the decision of the Court of Appeal.

E

Background Facts And Antecedent Proceedings

F

[7] We begin by stating the background facts and the antecedent proceedings which are relevant and material in order to better appreciate the why and how *res judicata* applies in this appeal.

Parties’ Relationship

G

[8] This case concerns a claim for debt owed by a company to former directors/shareholders. Lin Wen-Chih and Lin Wen-Chuan (“plaintiffs”) are brothers of Taiwanese nationals who were former shareholders and directors of Pacific Forest Industries Sdn Bhd (“first defendant”). They ceased to be shareholders/directors of the first defendant when they sold their shares to one Liu Ho-Tien who was described as the representative and nominee of Dutaland Berhad, formerly known as Mycom Berhad (“second defendant”).

H

[9] It was not disputed that at all material times the first defendant was indebted to the plaintiffs a total sum of RM10,134,000 as of 28 August 1996. The debt was admitted, acknowledged and evidenced, primarily through the

I

A first defendant's letter of acknowledgment dated 12 November 1996, and which was guaranteed by the second defendant's letter of undertaking similarly dated 12 November 1996.

[10] The first defendant's letter of acknowledgment is the most critical document as, although it was supposed to evidence parties' agreement on the mode of payment of the admitted debt, there were differences of interpretation by the parties of their rights and responsibilities in respect of the debt's settlement, particularly in respect of the following clauses, which we reproduced *in verbatim*:

C (2) We shall sell and you shall purchase timber products manufactured by us ("the timber products") at a price consistent with the prevailing market price and costing the same amount as the outstanding sum plus the agreed interest ("the timber products Price") from us over a period of ten (10) months from today and to be delivered over four (4) shipments;

D (3) the timber products Price shall be deducted from and set-off against the outstanding sum and the Agreed interest;

(4) subject to item 5 hereinafter contained, the outstanding sum and the Agreed interest shall be repaid by us to you only by way of deduction from and set-off against the timber products Price;

E (5) in the event that we shall fail, refuse and/or neglect to supply any of the timber products ordered by you or if any of the timber products supplied by us shall not be in accordance with the specifications stated in your purchase order(s), you shall be entitled, after giving us thirty (30) days' notice in writing to supply the timber products or replace the defective timber products and we have failed to do so, to cancel the order for such timber products or reject such timber products. Upon the order

F for such timber products being cancelled or such timber products being rejected and returned to us, we shall then pay cash *in lieu* of such timber products to you and such cash payment shall be deducted from and set-off against the outstanding sum and the Agreed interest; and

G [11] Pursuant to this arrangement, one delivery of timber products was successfully completed, hence reducing the debt amount to either RM6,223,241.10 as claimed by the plaintiffs, or RM5,431,454.87 as alleged by the first defendant.

The First 1997 Suit

H [12] In 1997, the plaintiffs filed the suit to claim RM6,223,241.10 being the balance of the outstanding sum. This claim was dismissed by the High Court on the basis of "premature" as the "plaintiffs failed to comply with the terms stipulated in exh. P2 (the letter of acknowledgment) within the time specified or within a reasonable time after the expiry and since it was not shown that the events that could have triggered the payment of cash had arisen" as there was only one concluded order for the timber products out

of four orders as contemplated in the letter of acknowledgment. The said decision is reported in *Lin Wen-Chih & Anor v. Pacific Forest Industries Sdn Bhd & Anor* [2001] 5 CLJ 519; [2001] 1 AMR 988.

A

[13] On appeal, the Court of Appeal reversed the findings of the High Court and set aside its decision on the basis of “frustration” as reported in *Lin Wen-Chih & Anor v. Pacific Forest Industries Sdn Bhd & Anor* [2008] 5 CLJ 29; [2008] 6 MLJ 89.

B

[14] On further appeal to the Federal Court, both the defendants succeeded in setting aside the decision of the Court of Appeal and reinstating the judgment of the High Court because the “frustration” issue which was the basis of the Court of Appeal’s decision was not the plaintiff’s pleaded ground. The decision of the Federal Court is reported in *Pacific Forest Industries Sdn Bhd & Anor v. Lin Wen-Chih & Anor* [2009] 6 CLJ 430; [2009] 6 MLJ 293.

C

[15] Notwithstanding, the matter did not end there. Another action was taken about three years after the 2009 decision of the Federal Court.

D

The Second 2013 Suit

[16] Despite knowing that the first defendant had stopped operating the sawmill in July 1998, the plaintiffs issued another fresh order dated 23 October 2012 for the supply of timber products purportedly as per the letter of acknowledgment. Thirty days were given for shipment of the timber products. Nothing was forthcoming from the first defendant. Thereafter, the plaintiffs issued another letter in December 2012 cancelling the purchase order and demanding immediate cash payment of RM6,223,241. A letter of demand was also sent to the second defendant as a guarantor. In May 2013, the plaintiffs filed the writ claiming the said sum together with interest thereto.

E

F

[17] The defendants admitted receiving the notices and demands by the plaintiffs. However, they denied liability mainly on two grounds – limitation and *res judicata*. Hence, a striking out application was filed and was allowed by the High Court.

G

[18] However, on appeal, the Court of Appeal reinstated the 2013 suit and set aside the High Court striking out order. Leave to appeal to the Federal Court was dismissed, and a review of the said Federal Court’s decision was withdrawn. The 2013 suit then proceeded to trial. It is reported in *Lin Wen-Chih & Anor v. Pacific Forest Industries Sdn Bhd & Anor* [2018] 1 LNS 2022; [2019] 9 MLJ 227.

H

[19] In this 2013 suit, the High Court was of the view that the claim was not barred by limitation or *res judicata*. Limitation did not set in because the “parties were actively involved during the process of litigation in the 1997

I

A suit when the said suit was filed on 22 November 1997 until it was finally decided on 7 September 2009 by the Federal Court after the appeal arising from the High Court and the Court of Appeal.”

[20] As regards *res judicata*, the High Court provided three main reasons. Firstly, it noted that the 2013 suit concerned the claim for “the fresh order of timber products they made on 23 October 2012 after the expiry of the ten months’ period as per the term of the letter of acknowledgement and subsequent to the pronouncement of the judgment in the 1997 suit.” The High Court was of the view that “this fresh order in 2012 is made possible since the previous High Court held that the plaintiffs’ claim is premature due to incomplete orders which finding is confirmed and upheld by the Federal Court.”

[21] Secondly, it was of the view that the defendants’ striking out application which was initially allowed by the High Court, was dismissed by the Court of Appeal. Further, by virtue of the dismissal for leave to appeal to the Federal Court, the High Court took the stance that “this only goes to show that the Federal Court is of the view that the principle of *res judicata* had no application in this case”, such that based on the principle of *stare decisis*, the plaintiffs’ claim was not caught by *res judicata*.

[22] Thirdly, the High Court referred to the decision of the Court of Appeal in *The Pacific Bank Bhd v. Chan Peng Leong* [1998] 2 CLJ 440; [1998] 2 MLJ 613 (“*The Pacific Bank Bhd*”) to support its view that the dismissal of the plaintiffs’ claim in 1997 on the ground of premature was not a bar to the recovery of the said debt in the 2013 suit.

[23] Having so decided however, the High Court dismissed the plaintiffs’ claim after a full trial. We do not intend to delve into every aspect of the High Court’s findings, but will focus on those aspects relating to its dismissal, on evidence, of the plaintiffs’ claim.

[24] Briefly, the High Court viewed that although the defendants admitted the debt, the parties were however bound by the agreed mechanism for the payment according to the letter of acknowledgment, that is “by way of contra and set-off against the purchase price of the sale and supply of timber products over the period of ten months.” Importantly, the High Court found that there was only one concluded sale and which was set-off against the debt.

[25] The High Court also found that the alleged three other orders were mere enquiries and not formal offers to purchase the timber products due to the absence of agreement on the pricing. As the plaintiffs failed to prove these three further orders and that the first defendant had refused to sell the timber products and/or had quoted a higher price, the first defendant cannot be said to have failed to fulfil its obligation under the letter of acknowledgment.

[26] In other words, the High Court was of the view that based on the letter of acknowledgement, the plaintiffs were duty-bound to first make the orders before the first defendant can supply the ordered timber products. Hence, the High Court found that the plaintiffs, “by their own conduct had failed to comply with the express and clear terms of the letter of acknowledgment”.

A

[27] The cash payment cl. 5 was also not triggered as no evidence was adduced to show that “the first defendant had refused to sell the timber products or if the timber products are sold, they were not in accordance with the specification or defective which give the plaintiffs the right to cancel the order and to claim for cash payment upon the expiry of the specified period.”

B

[28] Another important finding was that the 2012 fresh order was held to be a sham order to trigger the utilisation of cash payment in cl. 5 of the letter of acknowledgment, despite knowing that the first defendant had already closed down in 1998.

C

Plaintiffs’ Appeal And Defendants’ Cross-appeal On Limitation And *Res Judicata*

D

[29] Dissatisfied, the plaintiffs appealed to the Court of Appeal. The defendants also filed a notice of cross-appeal against the High Court’s decision in respect of the issues of limitation and *res judicata*. This is reported in *Lin Wen-Chih & Anor v. Pacific Forest Industries Sdn Bhd & Anor* [2020] 1 LNS 2104; [2021] 4 MLJ 367. Briefly, the Court of Appeal affirmed the High Court’s dismissal of the plaintiffs’ claim but reversed the findings on limitation and *res judicata*.

E

[30] On limitation, the Court of Appeal held that the 2013 suit was statutorily barred as it was filed about ten years after the action was time-barred by 9 November 2003. On suspension of the limitation period by virtue of the earlier 1997 suit which was finally disposed of by the Federal Court in 2009, the Court of Appeal found that the exclusionary provision in s. 14 of the Limitation Ordinance 1952 was not applicable to the facts of the case as there was no issue of jurisdiction or defect of it in the 1997 suit.

F

G

[31] Commenting on the case of *The Pacific Bank Bhd* relied on by the High Court as the authority that permits the filing of a fresh action, the Court of Appeal reasoned the “premature” ground in the first 1997 suit was not in the same sense as described or envisaged in *The Pacific Bank Bhd* because the Court of Appeal therein held the first letter of demand to be defective, which effectively means no proper demand was made and as such, there was in law, no valid cause of action entitling the issuance of the fresh demand.

H

[32] As for *res judicata*, the Court of Appeal had, upon analysing relevant reported cases and after a careful examination of the judgment of the 1997 suit, found that the facts and circumstances of the present case come within the principle of *res judicata* in the wider sense because:

I

- A (i) cause of action in both 1997 and 2013 suits were exactly the same which was based on the letter of acknowledgment and the letter of undertaking;
- (ii) the subject matter of both suits was exactly the same – the alleged outstanding sum of RM6,223,241 except for the accruing interest claimed in the 2013 suit;
- B (iii) the evidence adduced and issues raised by the plaintiffs in the 2013 suit were substantially similar to what was produced in the 1997 suit.

[33] On the alleged “new issues” in the 2013 suit regarding the plaintiffs being relieved of the obligations upon the expiry of the set-off period; the “void or voidable” status of the arrangement of payment in the letter of acknowledgment; and unjust enrichment, the Court of Appeal viewed that “these are issues which could have been, but were not raised in the 1997 suit ...”. Hence, it was held that “*res judicata* applies in respect of the multitude of issues which had been raised in the 2013 suit which are identical or bear a striking similarity to the issues which were raised in the 1997 suit. And, in so far as the so-called new issues are concerned, those are barred by *res judicata* in the wider sense.”

How Does *Res Judicata* Apply?

Res Judicata In The Wider Sense

[34] In deciding that the facts and circumstances of this case fall within the *res judicata* in the wider sense, we referred to what the Supreme Court held in *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189. Peh Swee Chin FCJ (delivering the judgment of the court), in accepting the well-established meaning, utility and necessity of *res judicata*, acknowledged the difference of opinion and school of thought as to its precise limits and application in particular cases.

[35] The Supreme Court preferred the view that issues which might have been and which were not brought forward, either deliberately or due to negligence or inadvertence, though not actually decided by the court, are still covered by the doctrine of *res judicata*. The justification for holding to such view is, as aptly stated that:

... it represents for one thing, a correct even though broader approach to the scope of issue estoppel. It is warranted by the weight of authorities to be illustrated later. It is completely in accord or resonant with the rationales behind the doctrine of *res judicata*, in other words, with the doctrine of estoppel *per rem judicatum*. It is particularly important to bear in mind the question of the public policy that there should be finality in litigation in conjunction with the exploding population; the increasing sophistication of the populace with the law and with the expanding resources of the courts being found always one step behind the resulting increase in litigation.

[36] *Henderson v. Henderson* (1843) 3 Hare 100 was quoted as defining the application of *res judicata* “not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time”.

A

B

[37] The “every point which properly belonged to the subject of litigation” in *Henderson* which was subsequently explained by Somervell LJ in *Greenhalgh v. Mallard* [1947] 2 All ER 255 as covering “issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them” was quoted with approval by the Privy Council in *Yat Tung Investment Co v. Dae Heng Bank & Anor* [1975] AC 581.

C

[38] In this case, the plaintiffs highlighted that *res judicata* did not apply mainly because:

D

- (i) the 1997 suit was held to be premature, entitling the plaintiffs to a fresh claim; and
- (ii) the 2013 suit included new issues of unjust enrichment; reciprocal enforcement of the terms contained in the letter of acknowledgment; self-induced frustration; and void or voidability of the payment arrangement – which are all not included in the 1997 suit.

E

[39] As regards the “premature” 1997 suit, the plaintiffs challenged the Court of Appeal’s assessment of the meaning of “premature” in relation to the issue of *res judicata*. It was alleged that the Court of Appeal had ascribed other meaning to such word when stating the following:

F

[147] The next point we will make as to the 1997 suit being “premature” is that the word premature which was used by the trial judge to describe that suit was perhaps somewhat of a misnomer. Our understanding is that the 1997 suit was not premature in the sense as described or envisaged in *The Pacific Bank* case.

G

[40] We have carefully read and examined the written judgment of the Court of Appeal, specifically those paragraphs where the “premature” issue was discussed, and we found that there was no redefinition of the word “premature” as alleged. In fact, its understanding of the meaning of “premature” was consistent with what the courts in 1997 had described.

H

[41] Firstly, it is important to understand that the authority used by the plaintiffs which was also cited by the High Court in the 2013 suit as supporting the fresh claim was *The Pacific Bank Bhd* case where Gopal Sri Ram JCA permitted the filing of a fresh action which was based on a defective invalid demand. In that regard, the Court of Appeal undertook a

I

- A comparative analysis of the facts in *The Pacific Bank Bhd* and the present case, and concluded that “premature” as meant by the High Court and the Federal Court in the 1997 suit exemplified the fact that “the plaintiffs had not complied with the terms of the letter of acknowledgment (cl. 5) so as to trigger the first defendant’s obligation to pay in cash ... that the plaintiffs had not made out their case for purposes of the claim which was predicated on the letter of acknowledgment.”

[42] The above statement by the Court of Appeal was in line with what the High Court stated in the 1997 suit that “since the plaintiffs failed to comply with the terms stipulated in exh. P2 within the time specified or within a reasonable time after the expiry and since it was not shown that the events that could have triggered the payment of cash had arisen the claim should therefore be taken as premature.” On this basis, we found no error by the Court of Appeal in its understanding of the meaning of “premature” of 1997 suit.

- D [43] We must also add that in a challenge based on *res judicata*, the court is entitled to examine and analyse the written judgments of the first 1997 suits and all other relevant records of appeal. As aptly stated by Lord Upjohn in the House of Lords’ case of *Carl-Zeiss-Stiftung v. Rayner and Keeler Ltd and Others (No 2)* [1966] 2 All ER 536 that:

E The broader principle of *res judicata* is founded on the twin principles so frequently expressed in Latin that they should be at an end to litigation and justice demands that the same party shall not be harassed twice for the same cause. It goes beyond the mere record; it is part of the law of evidence for, to see whether it applies, the facts and reasons given by the judge, his judgment, the pleadings, the evidence and even the history of the matter may be taken into account ...

- G [44] In this respect, we were satisfied that the important elements of *res judicata* were established and proved – that the identity of the subject matter of the present claim which was based on the same admission of debt evidenced through the letter of acknowledgment and the letter of undertaking had been conclusively dealt with on merits by the courts in the 1997 suit; and that the parties are exactly similar.

- H [45] On the new issues raised, we have highlighted that we agreed with the findings and decision of the Court of Appeal that those new issues, *albeit* being newly raised, are issues which fall under the category where “... the plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.” (per Sir James Wigram, VC in *Henderson v. Henderson* above).

[46] To conclude, we think it is appropriate to cite a passage by Lord Shaw (delivering the judgment of the Judicial Committee) in *Hoystead v. Commissioner of Taxation* [1926] AC 155 in respect of the application of *res judicata*, in the following statement:

In the opinion of their Lordships it is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgment upon a different assumption of fact; secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact. Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle. Thirdly, the same principle – namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken. The same principle of setting parties' rights to rest applies and estoppel occurs.

[47] Thus, given the strength of the authorities relied on in *Asia Commercial Finance*, we were constrained to hold that upon close examination and analysis of the facts and circumstances of this case, *res judicata* in the wider sense was rightly applied by the Court of Appeal.

[48] In the upshot, we dismissed the appeal with cost of RM50,000 to the respondents to be paid by the appellants subject to allocatur fees. The decision of the Court of Appeal was therefore affirmed.

A

B

C

D

E

F

G

H

I